STATE OF MICHIGAN

COURT OF APPEALS

SABAH JAJO, Plaintiff-Appellant,	UNPUBLISHED May 5, 2011
v	No. 296917 Oakland Circuit Court
VILLAGE BANQUET HALL, Defendant-Appellee.	LC No. 2008-090237-NO

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

In this personal injury claim, plaintiff Sabah Jajo appeals as of right the trial court's award of summary disposition to defendant Village Banquet Hall under MCR 2.116(C)(10). We affirm.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

For purposes of its motions for summary disposition, defendant accepted the facts set forth in plaintiff's deposition testimony as true. According to plaintiff's testimony, Alfred Yousif, defendant's owner and manager, hired him to frame two bathrooms located in the basement of defendant's facility. Plaintiff began work on the project on March 24, 2006. Although plaintiff had two ladders in his work van, neither ladder was suitable for the project. Plaintiff asked defendant's employees for a stepladder. Bedal Sulima,[1] an employee of defendant, provided plaintiff with a stepladder, which plaintiff used without incident on March 24 and 25. Plaintiff felt very comfortable using the stepladder and believed it was suitable to use for the project. On March 27, after plaintiff had worked for two and a half to three hours, the stepladder slid on the smooth ceramic tile on the floor of one of the bathrooms. Plaintiff fell backwards off of the stepladder and landed on his right side, breaking his right hip.

[1] Throughout his testimony, plaintiff referenced defendant's cook, who was later identified as Sulima.

Immediately after falling, plaintiff screamed in pain. Alfred Yousif, an electrician, and two painters ran downstairs and found plaintiff lying on the floor. When they asked him what happened, plaintiff indicated that he thought he had broken his right leg. Because plaintiff was in too much pain to move, the men placed him on a chair and carried him upstairs. Once upstairs, plaintiff asked the men to call an ambulance, but they refused. Plaintiff then asked the men to call his brother, Raad Jajo ("Raad"). Raad quickly arrived at defendant's facility, but shortly thereafter, Yousif Rayrs, a "traditional healer," also arrived. When Raad asked the men why they had not called an ambulance, Alfred Yousif said that an ambulance was unnecessary because Rayrs could heal plaintiff. Plaintiff believed that Alfred Yousif had asked Sulima to call Rayrs.

Plaintiff refused Rayrs's healing services, stating that he was in severe pain and believed his leg was broken. Raad called for an ambulance. Rayrs then told Alfred Yousif that he might be able to heal plaintiff by pulling his right leg. Alfred Yousif ordered the electrician and painters to hold plaintiff's shoulders and left leg and told Rayrs to do whatever was necessary to heal plaintiff. Against plaintiff's will, the three men held him down while Rayrs pulled his right leg. Plaintiff lost consciousness and did not regain consciousness until that night in the hospital.

On March 28, 2006, plaintiff had surgery on his right hip. He was hospitalized for a total of five days. Plaintiff testified that he had no medical problems before this injury. As a result of the injury, his right leg is shorter than his left leg, he experiences severe pain, and he cannot live normally. He has not done carpentry work since he was injured. Although plaintiff believes that Rayrs made his leg worse by pulling it, plaintiff's doctor never said that the pulling made the injury worse.

Plaintiff sued defendant on March 8, 2008. Plaintiff's count I alleged that defendant was negligent when it failed to: 1) provide him a safe place to work, 2) provide him a proper ladder, and 3) inspect his work area and ensure that he could safely stand on a ladder[2] to work. Plaintiff asserted that defendant's negligence caused his injury. In count II, plaintiff alleged that defendant was negligent when it: 1) failed to call an ambulance, 2) called Rayrs to heal him, and 3) had him held down against his will while Rayrs pulled his right leg. He asserted that defendant's negligent actions made his injury worse. Plaintiff's count III alleged that defendant's negligence in ordering its employees to hold him down and allowing Rayrs to pull his leg caused him to suffer severe pain and possibly aggravated his injury.

On October 8, 2008, defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10). On December 9, 2008, the trial court granted in part defendant's motion under MCR 2.116(C)(10). The trial court held that there was no genuine issue of material fact regarding count I because the evidence would "not support a finding of any breach of duty or causation attributable to [d]efendant." The stepladder provided was not defective nor was there

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[2] Although plaintiff's complaint referred to a chair rather than a ladder or stepladder, plaintiff's counsel later explained that the reference to a chair was an error, which resulted from an improper translation of plaintiff's allegations into the English language.

an unreasonably dangerous condition on the premises that caused plaintiff's injury. Therefore, the trial court found that defendant was entitled to summary disposition of count I. Regarding counts II and III, the court agreed with defendant that plaintiff failed to provide any evidence establishing that the pulling of his leg "caused any damage" to him. The court further held, however, that plaintiff's testimony supported his assertion that defendant ordered its employees to hold plaintiff down while Rayrs pulled on his leg and that the pulling caused him intense pain. Accordingly, the court limited plaintiff's recovery to pain suffered as a result of the pulling.

Thereafter, both parties moved for reconsideration. In a February 3, 2009, opinion and order, the trial court denied defendant's motion, which pertained to the court's refusal to dismiss counts II and III in their entirety. In regard to plaintiff's motion, the court stated that while plaintiff technically requested to amend his complaint in his response to defendant's motion for summary disposition, the request was conclusory and devoid of justification. Therefore, reconsideration on that basis was not appropriate. The court also clarified its holding regarding counts II and III, stating: "Plaintiff could not recover for the broken hip under Counts II and III, but rather could recover, if at all, only for the pain inflicted by the healer [Rayrs]." Finally, regarding count I, the trial court raised sua sponte the open and obvious danger doctrine, stating:

> Finally, Plaintiff seeks reconsideration of the Court's conclusion that Defendant could not be liable under Count I, based upon Defendant's provision of a step ladder lacking "nonskid rubber feet." The problem with this theory is that it is undisputed that Plaintiff used the step ladder on the ceramic floor for two full days before his injury occurred. In this context, it is difficult to see how any danger posed by the lack of "non-skid rubber feet" could have been anything but readily apparent to an average user of ordinary intelligence, i.e., open and obvious.
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> The problem, of course, is that Defendant did not explicitly challenge Plaintiff's claim on this basis. In light of the foregoing, the Court shall raise this issue on its own, and shall request briefing from the parties. . . . Until then, the Court shall not rule on this aspect of Plaintiff's motion for reconsideration.

At a March 25, 2009, hearing on the parties' supplemental briefs, the trial court stated that it was not necessary to consider the open and obvious danger doctrine because count I did not sound in premises liability and the evidence did not support a finding that there was a defective or unreasonably dangerous condition of the property. On April 1, 2009, the court issued an order dismissing count I for the reasons stated on the record.

Defendant filed a second motion for summary disposition under MCR 2.116(C)(10) on January 28, 2010. Defendant requested that the trial court dismiss counts II and III, asserting that it could not be held vicariously liable for Alfred Yousif's attempt to provide plaintiff medical care because Alfred Yousif's actions were committed outside the scope of his employment. On February 19, 2010, the court granted the motion, holding that is was "beyond factual dispute that [d]efendant's employees were acting outside the scope of their employment" and, therefore, defendant could not be held vicariously liable. The court dismissed the case against defendant. Plaintiff now appeals as of right.

II. THE COURT'S DISMISSAL OF COUNT I

Plaintiff argues that the trial court erred in dismissing count I of his complaint, which related to defendant's liability for injuries he sustained in his fall from the stepladder. According to plaintiff, because he was an independent contractor engaged in construction work on defendant's premises, defendant owed him a duty to take reasonable precautions to protect him from dangers associated with his use of the stepladder, even if such dangers were open and obvious. Plaintiff further asserts that his claim is one of ordinary negligence and, therefore, that the open and obvious danger doctrine does not apply. We disagree.

We review a trial court's award of summary disposition de novo. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim, *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004), and is reviewed "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party," *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is proper "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*.

Initially, we hold that plaintiff's count I sounds in premises liability, rather than ordinary negligence as he asserts on appeal. Michigan law distinguishes between claims resulting from premises liability and ordinary negligence. See, e.g., *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). "'The gravamen of an action is determined by reading the claim as a whole' and looking 'beyond the procedural labels to determine the exact nature of the claim.'" *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005) (citations omitted). "In a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land." *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). Thus, when an injury develops from a condition of the land, rather than from an activity or conduct that created the condition, the action sounds in premises liability. *James*, 464 Mich at 18-19. Liability with respect to an ordinary negligence claim stems from "the basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967), rev'd on other grounds 379 Mich 251 (1967).

In his complaint, plaintiff labeled count I "negligence" and asserted that defendant was negligent for failing to supply plaintiff with a safe workplace and proper ladder and failing to inspect his work area. But the labels attached to claims by the parties do not bind our courts. See *Randall v Harrold*, 121 Mich App 212, 217; 328 NW2d 622 (1982). Plaintiff testified that on his first day of work, he asked defendant's employees for a stepladder, which Sulima provided to him and he found suitable for his needs. Plaintiff used the stepladder for two days without incident. On the third day, the stepladder suddenly slipped on the ceramic tile floor while plaintiff was standing on it and, when he fell, he broke his right hip. Based on the evidence presented by plaintiff, it was the stepladder and the floor surface the stepladder was resting on, and not defendant's conduct, that caused him to fall and break his hip. Although defendant's employee provided plaintiff with the stepladder, that conduct did not produce the resulting harm. Rather, it was plaintiff's act of standing on a stepladder resting on a ceramic tile

floor that produced the resulting harm. Because defendant's alleged liability under count I emanated from the stepladder and its placement on the floor, the claim sounds in premises liability. See generally *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261; 532 NW2d 882 (1995) (observing that a premises liability action may be founded on an allegedly defective ladder used on the premises, at the invitation of the premises owner).

The applicability of the open and obvious danger doctrine is dependent on the theory of liability presented by the pleader and on the nature of the duty at issue. See *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006). The doctrine is applicable to premises liability actions, but does not apply to actions involving claims of ordinary negligence. *Id*. Because plaintiff's claim sounds in premises liability, his argument suggesting that the open and obvious danger doctrine is inapplicable fails.

The trial court ultimately dismissed count I based on plaintiff's ordinary negligence theory and, contrary to plaintiff's argument on appeal, did not apply the open and obvious danger doctrine. However, this Court will affirm the trial court where it came to the right result for the wrong reason. *Fisher v Blankenship*, 286 Mich App 54, 70; 777 NW2d 469 (2009). Thus, although plaintiff's claim should have been dismissed under the open and obvious doctrine, discussed *infra*, we affirm the trial court's dismissal of count I.

In a premises liability action, the plaintiff must prove: (1) the defendant had a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach of duty caused the plaintiff's injuries, and (4) the plaintiff suffered damages. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007).

The trial court never determined plaintiff's status on defendant's premises. Plaintiff entered the premises for the commercial or business purpose of doing carpentry work. Thus, plaintiff's status was that of an invitee. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 605; 614 NW2d 88 (2000), on remand 243 Mich App 461 (2000). In general, a premises possessor owes a duty to protect invitees from unreasonable risks of harm caused by dangerous conditions of the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). But a premises possessor is not an absolute insurer of an invitee's safety to the extent that the danger is open and obvious. *Id*.

The test for whether something is "open and obvious" is objective. *Corey v Davenport College of Business*, 251 Mich App 1, 5; 649 NW2d 392 (2002). The test is whether "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon causal inspection[.]'" *Kennedy*, 274 Mich App at 713 (citation omitted). This means the test is not whether a particular plaintiff should have known the condition was hazardous, but whether a reasonable person in the plaintiff's position would have foreseen the danger. *Id*.

Accepting plaintiff's deposition testimony as true[3] and viewing all of the evidence in the light most favorable to plaintiff, there is no genuine issue of material fact regarding whether any danger caused by use of the stepladder on the ceramic tile floor was open and obvious. Plaintiff broke his hip when he fell off of the stepladder that he placed on the ceramic tile floor. Plaintiff received the stepladder from one of defendant's employees after requesting it himself. He testified that he found the stepladder suitable for his work needs and used it, by placing it on the ceramic tile floor and standing on it, for two days before falling. A reasonable person would have been able to see that standing on a stepladder placed on a ceramic tile floor could pose a danger and, thus, the danger was open and obvious. See *id*.; see also *Eason*, 210 Mich App at 265 (stating that "[t]he danger that an extension ladder might slip and telescope down because of inadequate bracing at its base . . . is a danger readily apparent to persons of ordinary intelligence and experience").

Also, contrary to plaintiff's assertion, the fact that the stepladder may or may not have had non-skid rubber feet did not create an unreasonable risk of harm from which defendant had a duty to protect plaintiff. Rather, the use of a stepladder on a ceramic tile floor is a common occurrence and the danger associated with standing on top of a stepladder, with or without non-skid rubber feet, placed on a ceramic tile floor is foreseeable to reasonable people. See *id*. Therefore, the evidence submitted by the parties does not raise a question of fact regarding whether the stepladder posed an open and obvious danger.

Plaintiff also argues that because he was an independent contractor engaged in construction work on defendant's premises, defendant had a duty to take reasonable precautions to protect him despite the open and obvious nature of the danger. In so arguing, plaintiff cites *Hottmann v Hottmann*, 226 Mich App 171; 572 NW2d 259 (1997), and *Hughes v PMG Bldg*, 227 Mich App 1; 574 NW2d 691 (1997). Both cases rely on our Supreme Court's rationale in *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). However, the Court clarified *Bertrand* in *Lugo*, 464 Mich at 516-517. The *Lugo* Court concluded that whether a duty exists despite the open and obvious nature of a danger depends on whether the danger has a special aspect that creates an unreasonable risk of harm. *Id*. at 517. The general rule is that if "special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Id*. There are "special aspects" when an unreasonable risk of harm exists, such as a condition that is "effectively unavoidable" or poses a unique and "unreasonably high risk of severe harm." *Id*. at 517-518. In such situations, the premises possessor remains liable to the invitee to protect him from the danger. *Id*.

Viewing the evidence in the light most favorable to plaintiff, there is no genuine issue of material fact regarding whether special aspects existed to preclude application of the open and obvious danger doctrine. The condition of the stepladder was not effectively unavoidable. Plaintiff could have chosen not to work with a stepladder. He could have obtained a different

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[3] As indicated, for purposes of its motions for summary disposition, defendant agreed to accept plaintiff's version of the facts as true.

ladder or attempted to further stabilize the stepladder to prevent it from slipping on the ceramic tile floor. The condition of the stepladder also did not create an unreasonably high risk of severe harm. Plaintiff admitted that he used the stepladder for two days without incident. Further, the severity of harm from falling off of a stepladder is not the same as falling into a 30-foot deep pit. See *id*. at 518. Therefore, the record provided does not raise a question of fact regarding whether special aspects existed.

Accordingly, we conclude that the trial court did not err in granting defendant summary disposition of count I.

III. THE COURT'S DISMISSAL OF COUNTS II AND III

Plaintiff next argues that the trial court erred in dismissing counts II and III of his complaint because there is a genuine issue of material fact regarding whether Alfred Yousif and Sulima acted in the scope of their employment in attempting to provide him medical care. The trial court did not err.

As indicated, we review an award of summary disposition de novo. *Allen*, 281 Mich App at 52. Summary disposition under MCR 2.116(C)(10) is proper "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham*, 480 Mich at 111.

Under the doctrine of respondeat superior, an employer may be vicariously liable for an employee's act committed within the scope of his or her employment. *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996). An employer is not liable, however, for an employee's act committed outside the scope of employment. *Rogers v JB Hunt Transport, Inc*, 466 Mich 645, 651; 649 NW2d 23 (2002). An act is considered to be outside the scope of employment if the employee acts to accomplish a purpose of his own. *Martin v Jones*, 302 Mich 355, 358; 4 NW2d 686 (1942). Vicarious liability may arise where the employee's act was not specifically authorized if the act is similar or incidental to conduct that is authorized, considering factors such as whether the act is commonly done by the employee or whether the employee could in some way have been promoting or furthering the employer's business. *Bryant v Brannen*, 180 Mich App 87, 98-100; 446 NW2d 847 (1989), citing 1 Restatement Agency, 2d, § 229, p 506. Liability may arise where the employee commits the act while involved in a service of benefit to the employer. *Kester v Mattis, Inc*, 44 Mich App 22, 24; 204 NW2d 741 (1972). "While the issue of whether the employee was acting within the scope of his employment is generally for the trier of fact, the issue may be decided as a matter of law where it is clear that the employee was acting to accomplish some purpose of his own." *Bryant*, 180 Mich App at 98.

Accepting plaintiff's deposition testimony as true and viewing all of the evidence in the light most favorable to plaintiff, there is no genuine issue of material fact regarding whether Alfred Yousif and Sulima acted in the scope of their employment when they attempted to provide plaintiff medical care. According to plaintiff's testimony, after his fall, Alfred Yousif indicated that calling an ambulance was unnecessary because Rayrs could heal plaintiff. Instead of calling an ambulance, Alfred Yousif had Sulima call Rayrs. When Rayrs arrived, Alfred Yousif told him to do whatever was necessary to heal plaintiff and ordered the electrician and painters to hold plaintiff down so that Rayrs could pull on his leg. Alfred Yousif's orders, and

Sulima's act of calling Rayrs, did not confer a benefit on defendant. Their actions did not promote or further defendant's business, which involved hosting events such as weddings and birthdays. Rather, their actions were to fulfill Alfred Yousif's own purpose of providing plaintiff "traditional" medical care. Plaintiff has not pointed to any corporate interest that their actions were meant to fulfill.

Plaintiff emphasizes that Alfred Yousif is the owner and manager of the defendant company. Therefore, according to plaintiff, Alfred Yousif's orders and the acts committed pursuant to those orders had "corporate authorization," were committed in furtherance of a corporate interest, and fell within the scope of employment. But plaintiff has not presented any authority in support of this assertion. Under plaintiff's rationale, a defendant company would be vicariously liable for *any* act committed by an owner or manager or pursuant to an owner's or manager's instruction, and our Supreme Court has declined to impose strict liability on defendant employers. See *Zsigo v Hurley Med Ctr*, 475 Mich 215, 227; 716 NW2d 220 (2006). Additionally, we note that plaintiff did not specifically name Alfred Yousif or any other person as defendants in this action.

There is no genuine issue of material fact regarding whether Alfred Yousif and Sulima acted in the scope of their employment. Therefore, defendant is not vicariously liable for plaintiff's injury, and the trial court properly awarded defendant summary disposition of counts II and III.[4]

IV. PLAINTIFF'S REQUEST TO AMEND HIS COMPLAINT

Plaintiff argues that the trial court abused its discretion in denying his request to amend his complaint. We disagree.

A trial court's decision regarding a party's motion to amend its pleadings is reviewed for an abuse of discretion. *Wormsbacher v Seaver Title Co*, 284 Mich App 1, 8; 772 NW2d 827 (2009). An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

MCR 2.118(A)(2) provides: "Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be

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[4] Plaintiff indirectly suggests in his brief and reply brief on appeal that defendant is also vicariously liable for the acts of the electrician and painters who held him down per Alfred Yousif's request. But according to plaintiff's own testimony, the electrician and painters were not defendant's employees. In general, "one who employs an independent contractor is not vicariously liable for the contractor's negligence." *Janice v Hondzinski*, 176 Mich App 49, 53; 439 NW2d 276 (1989). Moreover, even if defendant could be held liable for their actions, plaintiff's claim would fail on the same basis that his vicarious liability claim regarding Alfred Yousif and Sulima fails.

freely given when justice so requires." A motion to amend should only be denied if there is: "'[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . . .'" *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997) (citation omitted).

Furthermore, a trial court may deny a motion to amend if it would prejudice the non-moving party. Our Supreme Court explained:

> [A] trial court may find prejudice when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial. [*Id*. at 659-660.]

Here, in the "relief" section of his brief in response to defendant's first motion for summary disposition, plaintiff requested that he "be allowed to amend his Complaint to state the premises liability cause of action and the civil conspiracy causes of action." In its December 9, 2008, opinion and order granting in part defendant's motion, the trial court stated:

> The Court makes a similar observation with respect to the theories of liability. Specifically, Plaintiff has claimed in his response that Defendant may be liable on theories such as civil conspiracy and assault and battery. The problem, however, is that these theories are not pled in Plaintiff's complaint, and there has been no request to amend. Therefore, these theories shall not be presented to the jury, and Plaintiff may not recovery on this basis.

Thereafter, plaintiff moved for reconsideration, arguing among other things that the trial court mistakenly stated that plaintiff made no request to amend his complaint. In its February 3, 2009, opinion and order, the court stated:

> In his motion, Plaintiff first takes issue with the Court's observation regarding the additional parties and theories of liability that Plaintiff raised in response to the motion, but which were not raised in his complaint. Specifically, "the Court was mistaken in finding that there was no request for amend [sic] because Plaintiff did request to amend in the Relief section of Plaintiff's brief in Response."
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> Plaintiff is correct in this regard. Specifically, in the "Relief" section of his brief, Plaintiff asks that he "be allowed to amend his Complaint to state the premises liability cause of action and the civil conspiracy causes of action." This was, however, the only reference to any request to amend in Plaintiff's brief. Moreover, the "request" does not refer to the assault and battery theory of liability, nor does it ask that the corporation's owner or the healer be named as defendants. Finally and most significantly, Plaintiff failed to address in any way the criteria for requesting leave to amend, such as undue delay or prejudice to the opposing party. See *In re Estate of Kostin*, 278 Mich. App. 47 (2008). In

> particular, Plaintiff offered no explanation of any kind for his failure to raise these theories and claims earlier, nor did he explain why adding them at this point would not prejudice Defendant by, at the very least, requiring that depositions be re-taken and discovery otherwise extended.
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> In other words, Plaintiff is technically correct in asserting that he requested leave to amend. His request, however, was so conclusory and devoid of justification that it cannot be considered legally significant. Therefore, reconsideration on this basis is not appropriate.

The trial court did not abuse its discretion in denying plaintiff leave to amend his complaint. Plaintiff did not make the request until after defendant filed its first motion for summary disposition. He requested to add two new theories of liability, and it is likely that defending against the new theories would have required additional rounds of discovery. Moreover, even if defendant would have had a reasonable opportunity to respond, plaintiff did not articulate with any specificity the grounds for the new claims. Therefore, we find no abuse of discretion. See *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 493-494; 618 NW2d 1 (2000) (holding that the trial court did not abuse its discretion in denying the plaintiffs leave to amend their complaint because they did not articulate with specificity the grounds for the new claim and delaying the proceedings would have prejudiced the defendants and public).

V. PLAINTIFF'S DUE PROCESS CLAIM

Plaintiff finally argues that he was denied due process when the trial court requested sua sponte that the parties submit supplemental briefing regarding the open and obvious danger doctrine and then awarded defendant summary disposition of count I of his complaint. We disagree.

This issue is unpreserved. We review unpreserved constitutional issues for plain error affecting substantial rights. *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009). Reversal is warranted only if the plain error seriously affected the fairness, integrity, or public reputation of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"Due process is a flexible concept, the essence of which requires fundamental fairness." *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). In a civil case, the basic requirements of due process include notice of the proceeding and a meaningful opportunity to be heard. *Id*. "Where a court considers an issue sua sponte, due process can be satisfied by affording a party an opportunity for rehearing." *Id*. at 485-486.

In its answer to plaintiff's complaint, defendant raised the open and obvious danger doctrine as an affirmative defense. Thereafter, in response to defendant's first motion for summary disposition, plaintiff attempted to raise a premises liability claim. In its motion for reconsideration, plaintiff argued that defendant was negligent for providing him with a stepladder lacking "nonskid rubber feet." He did not specifically address the open and obvious danger doctrine. In its February 3, 2009, opinion and order addressing the parties' motions for reconsideration, the trial court noted that the lack of "nonskid rubber feet" could not have been

anything but open and obvious. But because the parties had not addressed the open and obvious danger doctrine, the court requested that they submit briefing on the issue.

The trial court did not err in requesting sua sponte that the parties submit supplemental briefing on the open and obvious danger doctrine. The court provided both parties the opportunity to submit a brief and held a hearing on the open and obvious danger issue. Considering that plaintiff received notice and had a meaningful opportunity to be heard, we cannot conclude that he was denied due process. See *id*. Furthermore, while plaintiff's argument on appeal suggests that the trial court applied the open and obvious danger doctrine to count I of his complaint in awarding defendant summary disposition, the trial court ultimately dismissed count I based on plaintiff's ordinary negligence theory and did not apply the doctrine, as explained above. There was no plain error affecting plaintiff's substantial rights.[5]

Affirmed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck

[5] Given our conclusions on the foregoing issues, we need not address the remaining issues raised by plaintiff on appeal.